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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. ----

C. J. FITZHARRIS, Superintendent,
California Conservation Center,
Petitioner,

v.

PAUL EDWARD BLAYLOCK,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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A SUBSTANTIAL FEDERAL QUESTION IS RAISED BY THE RULING OF THE COURT BELOW WHICH PLACES AN ERRONEOUS INTERPRETATION ON FAY V. NOIA, 372 U.S. 391 (1963), BY REVERSING A DISTRICT COURT RULING THAT RESPONDENT HAD DELIBERATELY BYPASSED HIS AVAILABLE STATE REMEDY BY FORGOING AN APPEAL UPON ADVICE OF COUNSEL, AFTER HE HAD BEEN TRIED THREE TIMES FOR THE SAME OFFENSE AND HAD ONCE BEFORE SUCCESSFULLY APPEALED HIS CONVICTION OF THAT OFFENSE	5
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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on February 17, 1972.

CITATIONS TO OPINIONS BELOW

The judgment of the Court of Appeals, not yet reported, appears in Appendix A hereto. The memorandum opinion of the United States District Court, Eastern District of California, not reported, appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered February 17, 1972. A timely petition for rehearing was denied March 22, 1972, and this petition for certiorari was filed within 90 days of the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTES AND RULES INVOLVED

United States Code, Title 28:

§ 2254(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

United States Constitution:

Amendment VI, § 1

[SECTION 1.] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV, § 1

Citizenship

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

Did the Court of Appeals err in reversing the District Court order holding that respondent had deliberately bypassed his available state remedy by forgoing an appeal upon the advice of his counsel, after he had once before in the same case been successfully through the state appellate process?

STATEMENT OF THE CASE

Respondent, a prisoner at the California Correctional Institution at Tehachapi, California, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254(b). Since filing his petition, respondent was paroled from the California Department of Corrections and is at this time serving a term of imprisonment in the Nevada State Prison, Carson City, Nevada.

Respondent was tried and convicted of second degree murder in 1964. The conviction was reversed on appeal by the California Court of Appeal for the Fifth District on April 15, 1965, reported at 233 Cal. App.2d 603, 43 Cal.Rptr. 846. Respondent's retrial ended in a hung jury on September 16, 1965. After a third trial for the same offense, respondent was convicted of manslaughter and on January 6, 1966, was sentenced to the state prison for the term prescribed by law. Respondent did not appeal the conviction.

On December 16, 1968, respondent filed a petition for writ of habeas corpus in the United States District Court, Eastern District of California, attacking the 1966 California judgment, alleging numerous trial errors which allegedly constituted violations of his federal constitutional rights. The District Court denied the petition (see Appendix B), on the ground that respondent had deliberately bypassed his state appellate remedies.

The United States Court of Appeals for the Ninth Circuit granted a certificate of probable cause for appeal, and on February 17, 1972, reversed the decision and remanded the case to the District Court for a hearing on the question whether respondent had deliberately bypassed his available state remedies (see Appendix A).

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

A substantial federal question is raised by the ruling of the court below which places an erroneous interpretation on Fay v. Noia, 372 U.S. 391 (1963), by reversing a district court ruling that respondent had deliberately bypassed his available state remedy by forgoing an appeal upon advice of counsel, after he had been tried three times for the same offense and had once before successfully appealed his conviction of that offense.

Respondent was tried three times on the charge which led to the conviction for which he was imprisoned. The first trial resulted in a conviction from which respondent appealed and obtained a reversal. *People* v. *Blaylock*, 233 Cal.App.2d 603, 43 Cal.Rptr. 846 (1965). The second trial ended with a hung jury. The third trial resulted in a conviction from which respondent did not appeal. He stated in his petition that his decision not to appeal was made on the advice of counsel. Record on Appeal, page 4.[1] Since respondent appealed his first conviction, obtained a reversal and on advice of counsel chose not to appeal after his retrial and subsequent conviction, and since he did not allege facts indicating he was prevented from making meaningful decisions (Compare *Fay* v. *Noia*, 372 U.S. 391 (1963).), he should be held to have deliberately bypassed the state procedures for vindicating his present contentions and thus to have waived

[1] "Record on Appeal" refers to the record forwarded to the Court of Appeals, Ninth Circuit, Case No. 26714.

his right to raise such contentions in federal habeas corpus proceedings. *Fay* v. *Noia,* 372 U.S. 391 (1963). The conclusion is inescapable here that respondent knew of, and elected not to use, the remedy of appeal.

If a convicted state defendant may collaterally attack his state conviction in the federal court when he admits he chose to forgo a state appeal on the advice of counsel, then the deliberate bypass rule has been totally emasculated. Just as the rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision, neither should a waiver of the right to appeal after advice by competent counsel be subject to federal attack because the defendant failed to correctly assess the merits of a possible appeal. *Cf., Brady* v. *United States,* 397 U.S. 742 (1970). That a prisoner's decision not to appeal was based on his misjudgment of the factors mitigating for and against an appeal should give him no greater right to bring a collateral attack on his state conviction than if he had misjudged the merits of pleading guilty.

Respondent here admitted that he had consulted with his counsel regarding the question of an appeal and that his attorney advised against it. Respondent has not alleged that his failure to utilize his state appellate remedy was inadvertent or that his attorney's advice not to appeal was outside the range of competence. Respondent simply alleged that after his third trial for the same offense his attorney advised him

not to appeal, and that respondent "did not know [his] rights had been violated." Record on Appeal, page 3.

Further federal inquiry into the depth of a defendant's understanding of the appellate processes or the legal nuances and ramifications of the potential arguments he might have presented on appeal is unnecessary and inappropriate. The mere fact that respondent admittedly knew he could appeal and that on the advice of counsel, wilfully elected to forgo his state appeal sufficiently establishes his deliberate bypass of his state remedies so as to foreclose further federal inquiry into his justifications and excuses for failing to appeal.[2] Absent a claim of inadvertence or incompetence of counsel, neither of which respondent has made, federal habeas corpus relief should not be available. *Cf., McMann* v. *Richardson,* 397 U.S. 759 (1970); see also, *United States ex rel. Schaedel* v. *Follette,* 447 F.2d 1297 (2d Cir., 1971); *Kanan* v. *Denver District Court,* 438 F.2d 521 (10th Cir., 1971).

The Court of Appeals of two circuits have upheld the district courts' denials of state prisoners' federal habeas corpus applications without hearings where the applicants had deliberately allowed the period for perfecting state appeals to expire and in so doing, had forfeited their state remedies. *United States ex rel. Schaedel* v. *Follette, supra; Kanan* v. *Denver*

[2] At the time of respondent's third trial, under California law a defendant who successfully appealed his conviction could not be subjected to a greater penalty on retrial. *People* v. *Henderson,* 60 Cal.2d 482, 35 Cal. Rptr. 77, 386 P.2d 677 (1963).

District Court, supra. The results reached by these courts approach more closely the philosophy of this Court as set forth in *Brady* v. *United States, supra,* 397 U.S. 742; *McMann* v. *Richardson, supra,* 397 U.S. 759; and *Alford* v. *North Carolina,* 400 U.S. 25 (1970).

In holding that respondent here had not deliberately bypassed his state remedies, the Court of Appeals stated:

> "As we interpret *Fay* v. *Noia,* the deliberate bypass rule may not be applied against one who does not knowingly and understandably participate in the choice not to take an appeal from a state court conviction. . . ."

The Court of Appeals is adding a new dimension to the standards enunciated by this Court in *Fay* v. *Noia.* The Court of Appeals would set a higher standard of knowledge and understanding to permit a state defendant to bypass an appeal than this Court has set to permit a state defendant to plead guilty to first degree murder.

The fact that respondent's decision not to appeal his conviction was based upon the advice of competent counsel should foreclose further inquiry as to whether the respondent "understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts. . . ." *Fay* v. *Noia, supra,* 372 U.S. at 439.

The effect of the decision in the present case is to circumvent the policy of the Congress as expressed in 28 U.S.C. section 2254.

The legislative history of section 2254 makes it clear that a major goal of the legislation was to alleviate the burden imposed upon the federal courts by the abuse of the habeas corpus writ by state prisoners. The House Judiciary Committee report on the 1966 revision to section 2254 expressly stated that:

> "While in only a small number of these applications have the petitioners been successful, they nevertheless have not only imposed an unnecessary burden on the work of the Federal courts but have also greatly interfered with the procedures and processes of the State courts by delaying, in many cases, the proper enforcement of their judgments." H. R. Rep. No. 1892, 89th Cong., 2d Sess. 5 (1966).

The Senate Judiciary Committee similarly considered one of the functions of section 2254 to be the reduction of the number of unnecessary habeas corpus applications submitted to the federal courts by state prisoners. S. Rep. No. 1797, 89th Cong., 2d Sess. (1966).

The decision of the Court of Appeals here flies in the face of an expressed objective of the Congress in setting forth a federal-state habeas corpus relationship. The Ninth Circuit decision enlarges the access of a state prisoner to the federal courts. Under the test of this decision, a state defendant may elect whether he wants to employ the state appellate procedures or whether he would prefer to wait and go directly to the federal courts.

Moreover, the Ninth Circuit has, in effect, told the state judicial systems, "You have but two alternatives: (1) You must abandon all procedural limits on an appeal after a state conviction; or (2) You must accept the substitution of federal habeas corpus for your state appellate process."

Neither of these results squares with the intent of Congress as expressed in section 2254.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL EDWARD BLAYLOCK,
Appellant,
vs.
C. J. FITZHARRIS, Superintendent,
Appellee.
No. 26,714

[February 17, 1972]

Appeal from the United States District Court for the Eastern District of California

Before: HAMLEY, ELY, and TRASK, Circuit Judges.

PER CURIAM:

Blaylock is a California state prisoner. Claiming that certain of his federal constitutional rights had been infringed, he filed a petition for habeas corpus in the District Court. The District Court, without conducting an evidentiary hearing, denied the petition upon the grounds that Blaylock had failed to exhaust available state court remedies and that he had deliberately bypassed the California courts.

Blaylock's state court conviction was for the offense of manslaughter, and he did not take a timely appeal from that conviction. Subsequently, he sought unsuccessfully to take an untimely appeal to the California appellate courts, and he was also unsuccessful in obtaining relief by way of habeas corpus in the California courts.

We have concluded that Blaylock did in fact exhaust his available state court collateral remedies, and here, the appellee does not argue to the contrary.

The District Court apparently arrived at its conclusion that Blaylock had deliberately bypassed the state courts because he failed promptly to take a direct appeal from the state court judgment of conviction. On the deliberate bypass issue, the Supreme Court has set forth the appropriate standard as follows:

> "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default."

Fay v. Noia, 372 U.S. 391, 439 (1963).

In applying the foregoing standard adversely to Blaylock, the court apparently relied upon two statements supplied by Blaylock in the court's standard habeas corpus form. Blaylock wrote that he did not promptly take a state court appeal because he "[d]id not know [his] rights had been violated" and because he "[w]as advised by appointed attorney not to appeal." We do not interpret either of these statements as clearly revealing that Blaylock "understandingly and knowingly forewent the privilege of

seeking to vindicate his federal claims in the state courts. . . ." As we interpret *Fay v. Noia,* the deliberate bypass rule may not be applied against one who does not knowingly and understandably participate in the choice not to take an appeal from a state court conviction. *Id.* at 439. Moreover, *Fay v. Noia* held that a habeas petitioner is entitled to an evidentiary hearing on the issue, if genuine, of deliberate bypass, and our court has, of course consistently followed this direction. *Pineda v. Craven,* 424 F.2d 369, 371 (9th Cir. 1970); *Taylor v. Arizona,* 424 F.2d 271, 273 (9th Cir. 1970).

Upon remand, the District Court must conduct an evidentiary hearing on the deliberate bypass issue, and if that issue is resolved in Blaylock's favor, conduct the necessary inquiry into Blaylock's claims as to the infringement of rights guaranteed to him by the federal constitution.

Reversed and remanded.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

PAUL EDWARD BLAYLOCK, *Petitioner,* vs. C. J. FITZHARRIS, Supt., *Respondent.*	CIV. S–1452 MEMORANDUM AND ORDER

Petitioner has filed with this court an application for a writ of habeas corpus, challenging his custody by the Superintendent of the Correctional Training Facility at Soledad, California.

Petitioner was convicted of the crime of manslaughter and is serving a term for that conviction. He states that on the advice of counsel he did not appeal from the judgment of conviction.

Habeas corpus will not lie in a federal court where a state prisoner has waived his opportunity to present his claims to the state court for adjudication by a deliberate bypass of appellate procedure. *Fay v. Noia,* 372 U.S. 391 (1963); Title 28 U.S.C. § 2254.

While petitioner presented his complaints to the California courts by way of habeas corpus, it is apparent he did not meet the standards required in the forum, either by way of procedures or factual statements. *In re Shipp,* 62 Cal. 2d 547, 553 (1965); *In re Swain,* 34 Cal. 2d 300, 302 (1949).

From the foregoing it is apparent as a matter of law that petitioner is not entitled to the relief he seeks in this court.

IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus be, and the same is hereby, denied.

DATED April 14, 1970 M. D. CROCKER

United States District Judge

APPENDIX C

(a) [Time of filing] In the cases provided by law, an appeal is taken by filing a written notice of appeal with the clerk of the superior court within 10 days after the rendition of the judgment or the making of the order, except that an appeal from an order denying a motion for a new trial in cases where the defendant is committed before final judgment for sexual psychopthy, insanity, or narcotics addiction may be taken within 10 days after the making of such order or the defendant's commitment, whichever is later. A notice of appeal filed prior to the time prescribed therefor is premature but may, in the discretion of the reviewing court for good cause, be treated as filed immediately after the rendition of the judgment or the making of the order.

Whenever a notice of appeal is received by the clerk of the superior court after the expiration of the period prescribed for filing such notice, the clerk shall mark it "Received (date) but not filed" and advise the party seeking to file the notice that it was received but not filed because the period for filing notice of appeal had elapsed and that he may petition the reviewing court for relief by verified statement or declaration under penalty of perjury, setting forth the date of the order or judgment from which the party seeks to appeal, the steps which the party took to file his notice of appeal on time, and any other information which has, or which the party believes has, a bearing upon the circumstances which caused the notice of appeal to arrive late.

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